AN ITALIAN TALE OF TWO COURTS. JUDGMENT Nº 49/2015 OF THE ITALIAN CONSTITUTIONAL COURT AND ITS RELATIONSHIP WITH STRASBOURG

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SUMMARY: I. STRUCTURE AND GOALS OF THE ARTICLE. II. THE ECHR IN ITALY: A BRIEF RECAP. III. JUDGMENT Nº 49/2015. IV. A DROP (OF DISOBEDIENCE) IN AN OCEAN OF LOYALTY? V. FINAL REMARKS.

RESUMEN: A finales de marzo de 2015, el Tribunal Constitucional italiano (o "Corte Costituzionale" o "Consulta") emitió una decisión importante, donde se aclaró el contenido de la obligación de tener en cuenta la jurisprudencia del Tribunal Europeo de Derechos Humanos («CEDH» o «el Tribunal de Estrasburgo»). Con el fin de ofrecer un análisis detallado de la sentencia nº 49, este trabajo se dividirá en tres partes: en primer lugar, vamos (brevemente) a recordar las novedades más importantes introducidas por el Tribunal Constitucional

ABSTRACT: At the end of March 2015, the Italian Constitutional Court released an important judgment clarifying the content of the duty to take into account the case law of the European Court of Human Rights. In order to offer a detailed analysis of decision n° 49, this work will be divided into three parts: first, we shall (briefly) recall the most important novelties introduced by the Italian Constitutional Court through and after the so

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italiano a través de y después de las llamadas «sentencias gemelas» (348 y 349/2007) de 2007. En segundo lugar, analizaremos el contenido de la sentencia nº. 49/2015, y, finalmente en la última sección del artículo vamos a ofrecer algunas observaciones finales.

PALABRAS CLAVE: Tribunal Constitucional italiano, Tribunal Europeo de Derechos Humanos, desobediencia judicial, jueces ordinarios.

called «twin judgements» (348 and 349/2007) of 2007. Secondly, we shall recall the contents of decision n° 49/2015 while in the last section of the article we shall offer some final remarks.

KEYWORDS: Italian Constitutional Court, European Court of Human Rights, judicial disobedience, ordinary judges.

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I. STRUCTURE AND GOALS OF THE ARTICLE

At the end of March 2015, the Italian Constitutional Court (or «Corte Costituzionale» or «Consulta») released an important judgment clarifying the content of the duty to take into account the case law of the European Court of Human Rights («ECtHR» or «the Strasbourg Court»). First, the Italian Constitutional Court recalled the preeminent function performed by the Strasbourg Court in the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (or «the Convention» or «the ECHR») and the duty to interpret domestic law in a manner consistent with it. At the same time, the *Corte Costituzionale* stated that domestic judges are not «passive recipients of an interpretative command issued elsewhere in the form of a court ruling, irrespective of the conditions that gave rise to it»[1], however, «this does not mean that the courts can disregard the interpretation made by the Strasbourg Court, once it has become consolidated with a certain effect»[2]. In order to clarify this point, the Italian Constitutional Court made a distinction between cases where the national judge has to deal with an established case law of the Strasbourg Court and cases where there is no established case law. In the recent *Parrillo* case[3], the ECtHR has recalled judgement nº 49 as an important development in the case law of the Italian Constitutional Court and this confirms the relevance of this decision. In order to offer a detailed analysis of decision nº 49, this work will be divided

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In this work we translate the formula «giudici comuni» into English by employing the term «ordinary courts/judges». Technically this translation is not correct, since in Italy by «giudici comuni» we mean both the administrative and «ordinary» judges (criminal and private law judges). For the purpose of this work, however, we are going to use «ordinary» as the translation of «comuni», by referring to administrative judges as well.

1. Italian Constitutional Court, decision nº 49/15, par. 7 (*Considerato in diritto*), available at: *http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S49_2015_en.pdf*.
2. *Ibidem*.
3. ECtHR 27 August 2015, App. nº 46470/11, *Parrillo V. Italy*, par. 100: «In this context the Court observes that, in a recent judgment (nº 49, deposited on 26 March 2015) in which it analysed, inter alia, the place of the European Convention on Human Rights and the Court's case-law in the domestic legal order, the Constitutional Court indicated that the ordinary courts were only bound to comply with the Court's case-law where it was "well-established" or expressed in a "pilot judgment"». See also the joint partly concurring opinion of Judges Casadevall, Raimondi, Berro, Nicolaou and Dedov, par. 8-10.

into three parts: first, we shall (briefly) recall the most important novelties introduced by the Italian Constitutional Court through and after the so called «twin judgements» (348 and 349/2007) of 2007. Secondly, we shall recall the contents of decision nº 49/2015 while in the last section of the article we shall offer some final remarks.

II. THE ECHR IN ITALY: A BRIEF RECAP

In order to understand the evolution of the case law of the Italian Constitutional Court, one has to start with the original position of the *Consulta*, which reflected a dualist conception of the relationship between the ECHR and domestic law.

Since the entry of the ECHR into the Italian legal order was enacted via an ordinary law (Law 848/1955), the Italian Constitutional Court considered, for a long time and with some exceptions[4], the ECHR as a source at the level of statutory legislation. Consequently, the *lex posterior derogat priori* rule applied in case of conflict between the law covering the ECHR and another Italian provision.

This was the case until the 1990s, when the *Corte Costituzionale* changed its mind, and began to make a distinction between the content and the form of the laws giving effect to international treaties[5]. In other words, since from a material point of view the content of the ECHR aims at protecting rights codified in the Italian Constitution, it seemed to be necessary to readjust the previous case law. The Court argued it in light of the axiological continuity between some provisions of the Convention and those of the Constitution, also in light of Art. 2 Const. which is devoted to fundamental rights[6].

Another turning point was the constitutional reform dated 2001, adopting a new version of Art. 117, paragraph 1. The latter now reads: «Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from Community law and international obligations».

The interpretation of this provision has been key to two fundamental decisions of 2007, in which the Constitutional Court[7] clarified the position of the ECHR in the domestic legal system. According to the Italian Constitutional Court, the Convention has a super-primary value (*i.e.* its normative ranking is halfway between statutes and constitutional norms). This is confirmed by the fact that, in some cases, the ECHR can serve as an «interposed parameter» for the constitutional review of primary laws, since the

4. Italian Constitutional Court, decision nº 10/1993, available at: *www.cortecostituzionale.it*, where the *Corte Costituzionale* described the ECHR as an «atypical source of law».

5. Italian Constitutional Court, decision nº 388/1999, available at: *www.cortecostituzionale.it*.

6. Art. 2 It. Const.: «The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled».

7. Italian Constitutional Court, decisions Nos. 348 and 349/2007, available at *www.cortecostituzionale.it*.

conflict between them and the ECHR can entail an indirect violation of the Constitution, namely of its Article 117, par. 1. Since Article 117 recalls international obligations, a conflict between a national piece of legislation and the ECHR can be solved by considering the ECHR as an external part of the standard employed by the *Corte Costituzionale* to review the constitutionality of domestic norms. In other words, by interposed norm («norma interposta») scholars mean those norms that are sub-constitutional from a formal point of view but somehow indirectly recalled by a constitutional provision and thus able to «complement» the constitutional text. In this sense, a violation of these norms by a legislative provision can amount to an indirect violation of the Constitution. Since Article 117 Const. recalls that the legislator has to respect international obligations, the breach of the ECHR may lead to an indirect violation of Article 117 Const.

The constitutional *favor* accorded to the ECHR implies the obligation to interpret national law in light of the ECHR's norms. At the same time, this does not imply that the ECHR has a constitutional value; on the contrary, the ECHR has to respect the Constitution.

More recently[8], the Italian Constitutional Court confirmed the interpretative *favor* to be acknowledged to the case law of the ECtHR. Indeed, the important role of the Strasbourg Court in this context seems to contribute to the special nature of the ECHR itself, which has been conceived as a supra-legislative instrument, for the closeness between the wording of its provisions and the language of the Constitution[9].

In 2011 the *Corte Costituzionale* gave another ruling (decision nº 80/2011) which represents the *summa* of its view on the matter[10]. This decision is, again, based on the distinction between EU law (for which it is possible to accept those limitations to the Italian sovereignty recalled by Art. 11 of the Italian Constitution) and the ECHR (for which the application of Art. 11 seems to be misplaced, according to the Constitutional Court)[11]. However, the openness inspiring the doctrine of the Italian Constitutional Court does not exclude divergences between the *Consulta* and the

8. Among others, see Italian Constitutional Court, decisions Nos. 311/2009, 317/2009, 80/2011, available at *www.cortecostituzionale.it*.

9. Another symptom of the importance of the case law of the ECtHR in the national legal system is the recent judgment nº 113/2011 of the Constitutional Court. The Consulta declared Art. 630 c. 1 lett. (a) of the Code of Criminal Procedure unconstitutional in the part in which it does not allow the re-opening or review of a case amounting to res iudicata, which it found to be in breach of the Convention. See: Italian Constitutional Court, decision nº 113/2011, available at *www.cortecostituzionale.it*.

10. A Ruggeri «La Corte fa il punto sul rilievo interno della CEDU e della Carta di Nizza-Strasburgo (a prima lettura di Corte cost. nº 80 del 2011)» (2011) available at: *http://www.forumcostituzionale.it/wordpress/*.

11. Art. 11 It. Const.: «Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organizations furthering such ends».

Strasbourg Court. In judgment nº 230 of 2012, the Italian Constitutional Court emphasised the specific features of the domestic legal order *vis-à–vis* the traits characterising the system of the Convention[12], thus remarking the possibility of episodic divergences. Such a variance materialised in a later judgment (nº 264/2012), wherein the *Consulta* distinguished its role from the one of the Strasbourg Court in a clear manner[13]. The Constitutional Court stated that «Differently from the ECtHR, this Court […] performs a systemic evaluation, and not an isolated one, of the values involved by the norm under analysis, and it is therefore obliged to that balancing exercise, which only pertains to itself […]»[14].

Recently, the exchange of views between the Italian Constitutional Court and the Strasbourg Court has become more and more frequent.

This is the frame in which judgment nº 49/2015 should be read in order to understand its content.

III. JUDGMENT Nº 49/2015

Decision nº 49/2015 of the Italian Constitutional Court stemmed from two preliminary questions, respectively raised by the Italian Supreme Court (or «Corte di Cassazione») and the «Tribunale» (a court) of Teramo. The facts of the cases involved the unlawful parcelling of the land and unlawful building of works. Both the conducts are treated in Italy as criminal offences. The questions raised focused on Article 44(2) of d.P.R. (decree of the President of the Republic) of 6 June 2001 nº 380 (Consolidated text of legislative and regulatory provisions in the area of construction). This provision states that «A final judgment of a criminal court that establishes that unlawful parcelling has occurred shall order the confiscation of the land unlawfully parcelled and of the works unlawfully built». The confiscation is ordered even without a conviction, provided that the existence of the criminal conduct is verified in the context of a fair trial. The author must have committed the offence (at least) with negligence. Therefore, at stake there was the obligation, for ordinary judges, to order a confiscation where the existence of a criminal conduct has been ascertained, but in the absence of a conviction. In the cases of the two references discussed, the absence of the conviction was due to the prescription of the offence (which amounts to saying that the offence is time-barred). In this regard, some elements concerning the functioning of the Italian criminal justice system must be pointed out. First, in Italy the confiscation may be disposed without a conviction, e.g. when an offence can no longer be subject to punishment. One of the cases in which an offence can

12. A. Ruggeri, «Penelope alla *Consulta*: tesse e sfila la tela dei suoi rapporti con la Corte EDU, con significativi richiami ai tratti identificativi della struttura dell'ordine interno e distintivi rispetto alla struttura dell'ordine convenzionale ("a prima lettura" di Corte cost. n. 230 del 2012)» (2012), available at: *http://www.dirittocomparati.it/2012/10/penelope-alla-Consulta-tesse-e–sfila-la-tela-dei-suoi-rapporti-con-la-corte-edu-con-significativi-ri.html#mor.*

13. Italian Constitutional Court, decision nº 264/2012, available at: *www.cortecostituzionale.it.*

14. Italian Constitutional Court, decision nº 264/2012, available at *www.cortecostituzionale.it*.

no longer be subject to punishment is where that offence is time-barred. Secondly, the prescription does not preclude the verification that the criminal conducts have been actually committed.

Both the referring courts considered that this state of play concerning the confiscation without a conviction –legitimised by the *Corte Costituzionale* in a number of judgments[15]– had been overruled by the *Varvara* case[16], a decision of the Strasbourg Court (also) on the interpretation of Article 7 of the European Convention. Article 7 ECHR states in particular that «No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed». The Strasbourg Court in *Varvara*, concerning a case of confiscation without a conviction, held that «the criminal penalty which [is] imposed on the applicant despite the fact that the criminal offence [has] been time-barred and his criminal liability [has] not been established in a verdict as to his guilt, is incompatible with the principle that only the law can define a crime and prescribe a penalty, which the Court has recently clarified and which is an integral part of the legality principle laid down in Article 7 of the Convention»[17]. The two referring courts interpreted in opposite ways the effects of the Strasbourg Court's decision on Article 44(2) d.P.R.

According to the *Corte di Cassazione*, *Varvara* would oblige the national judge to recognise the principle that a confiscation order is precluded, where a criminal offence is time-barred. The *Cassazione* further affirmed that the national judge is bound by such principle, even though this principle does not amount to a well-established case-law of the Strasbourg Court. On the other side, the *Cassazione* saw the interpretation given by the Strasbourg Court as incompatible with Articles 2, 9, 32, 41, 42 and 117(1) of the Italian Constitution. According to the mentioned provisions, health, life and environment have to be protected as fundamental constitutional values, which also prevail over the right to property challenged by the confiscation order. In this sense, the observance of international law obligations stemming from Article 117(1) of the Italian Constitution (including compliance with the Convention) may never result in lowering the level of protection guaranteed at the national level.

The «Tribunale» of Teramo also found that *Varvara* introduced the principle that confiscation without a conviction would be precluded by Article 7 of the Convention. However, and contrary to the *Corte di Cassazione*, the «Tribunale» of Teramo held that Article 44(2) d.P.R would not preclude the confiscation without a conviction. After *Varvara*, such a rule would be incompatible with Article 117(1) of the Constitution, which would oblige the ordinary judge to follow the principle stated in that decision. The Constitutional Court declared the references inadmissible for a number of reasons, which are now explained in turn.

15. Italian Constitutional Court, decision nº 187 of 1998, Judgments nº 239 of 2009 and nº 85 of 2008, available at *www.cortecostituzionale.it*.

16. ECtHR 29 October 2013, App. nº 17475/09, *Varvara* v *Italy*.

17. ECtHR, App. nº 17475/09, par. 49.

First reason

First, the *Corte Costituzionale* argued that the reference of the *Corte di Cassazione* was inadmissible since the latter had mistakenly referred to Article 44 d.P.R. 380/2001, rather than Law nº 848/55, ratifying and implementing the European Convention on Human Rights into the Italian legal order. Indeed, it was Law nº 848/55 that implemented the norm the constitutionality of which was disputed by the *Corte di Cassazione* (the prohibition to apply the confiscation only following a criminal conviction). That being so, the *Corte Costituzionale* found that Law 848/1955 should have constituted the subject of the reference. The *Corte di Cassazione* had stated that, after the *Varvara* case, Article 44 d.P.R. must be ascribed the meaning given to it by the Strasbourg Court, and that such an interpretation would be contrary to the Italian Constitution. The *Corte Costituzionale* disagreed with the *Corte di Cassazione* for two reasons. First, the referring court had assumed that the definition of the meaning of Law 848/1955 was a matter for the Strasbourg Court. On the contrary, the *Corte Costituzionale* recalled that the Strasbourg Court rather assesses whether the national law brought before it has resulted in a violation of the Convention. Secondly, even though the national judges have a duty to interpret the national law consistently with the European Convention, this interpretation has to be in compliance with the Italian Constitution. This reflects the axiological predominance of the Constitution over the Convention. The Constitutional Court acknowledged that, sometimes, these two sources can converge around a common approach to human rights protection. However, where this interpretative convergence between legal practitioners and constitutional and international courts cannot be achieved, the national judge must first and foremost provide an interpretation compatible with the Constitution.

Second reason

The reference of the *Corte di Cassazione* was also inadmissible as it lacked relevance. According to the referring court, after *Varvara* even the confiscation against third party would have been precluded, in the absence of a conviction. On the other hand, the same *Cassazione* observed that the bad faith of such third parties, which is a legal requirement for the confiscation against them *ex* Article 44(2) d.P.R, had not emerged clearly from the files in the main proceedings. The Constitutional Court argued that the type of confiscation at stake had been regarded as an administrative penalty for many years, imposed for the mere fact that the work had been objectively unlawful. To this end, it might be helpful to recall that the Strasbourg Court has been elaborating a substantive (namely, beyond the domestic classification) meaning of «criminal charge» since the *Engel* case[18]. By doing so, the Court has found that many «criminal» measures (substantially speaking) had been labelled as «non-criminal» by Member States, in order not to apply to such «non-criminal» measures the

18. ECtHR 8 June 1976, App. Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, *Engel and Others* v *The Netherlands*; see also ECtHR 21 February 1984, App. nº 8544/79, *Öztürk* v *Germany*.

guarantees that usually apply to criminal law. This case-law has resulted in considerably heightening the level of protection of the persons concerned, with the member states obliged to endow these (substantially) criminal measures with a fair array of guarantees. A key step in this case-law is represented by the *Sud Fondi* decision[19], where the Strasbourg Court has established that a type of confiscation similar to that challenged in *Varvara* amounts to a «criminal» penalty. Pursuant to *Sud Fondi*, such a confiscation can be imposed only where the author's mental link (awareness and intention) with the offence has been established. The *Corte Costituzionale* acknowledged this principle in judgment nº 239/09[20]. In that judgment, the *Corte Costituzionale* added that the responsibility of the person concerned can be established, and the subsequent confiscation ordered, even though the offence is time-barred. On the other hand, the Constitutional Court stated that the confiscation can be imposed only against those persons whose responsibility has been established, which requires in turn that the presumption of innocence of the persons concerned has been rebutted. This clarifies that, independently of the possible innovations brought about by the *Varvara* judgment, a third party buyer in good faith can never be affected by confiscation. As pointed out by the same referring court, the case file did not enable to exclude the good faith of the third party buyer. In light of the foregoing, the confiscation against the third party was not precluded by the prohibition allegedly introduced by *Varvara*, but rather by the circumstance that their bad faith had not been proven in the main proceedings.

Third reason

The *Corte Costituzionale* declared both the questions inadmissible also because they were grounded on an incongruous presuppose. The referring courts had argued that they were obliged to apply the principle stated by the Strasbourg Court in *Varvara*; a principle which, according to the national judges, could have represented a considerable innovation, compared to the Strasbourg Court's previous case-law. The Constitutional Court found that the referring courts had misinterpreted the meaning of *Varvara*. Indeed, the referring courts had stated that such a principle (the need for a conviction in order to impose the confiscation) would have had broad implications. According to them, since the Strasbourg Court has regarded the confiscation as a criminal penalty, that penalty could be applied only in the context of criminal proceedings. This could have been held true also for any other measure labelled as «criminal», regardless of the choices made by the national legislature in this respect.

The Constitutional Court found this interpretation of *Varvara* incompatible with both the Italian Constitution and the Convention. First, it would have impinged upon the legitimate margin of discretion enjoyed by the national legislature in choosing the instruments to pursue the effective imposition of legal obligations[21].

19. ECtHR 30 August 2007, App. nº 75909/01, *Sud Fondi srl and Others* v *Italy*.

20. Italian Constitutional Court, decision nº 239/09, available at *www.cortecostituzionale.it*.

21. Italian Constitutional Court, decision nº 317/1996, available at *www.cortecostituzionale.it*.

Secondly, the principle of criminal law as *ultima ratio* was at stake, on account of which criminalisation must be resorted to only where other kinds of measures cannot guarantee a sufficient protection to the interests in question. The Strasbourg Court itself has stated that a «criminal» penalty (intended in its substantive meaning) may be applied also by an administrative authority, provided that the standard of Article 6 of the Convention on fair trial is fulfilled[22]. In this regard, a formal declaration of guilt by a criminal court would not be essential[23]. That being so, the *Corte Costituzionale* set aside the interpretation of the referring courts.

The Constitutional Court also argued that, when lacking a Strasbourg Court's established case-law on a given subject matter, the national judge has to interpret the national norm as far as possible coherently with that case-law, but *in any case* and *mostly* with the Italian Constitution. In *Varvara* the Strasbourg Court stated that Article 7 of the Convention precludes the application of a «criminal penalty», when the liability is not declared by a conviction. The *Corte Costituzionale* found that the key point in this context was the meaning to attach to the term «conviction»: whether it referred to a formal understanding (which amounts to a judicial declaration), or whether it related to the substance (namely that the commission of the offence had been actually ascertained, even if not followed by a formal conviction). According to the *Corte Costituzionale,* the «substantive» option would have corresponded to a principle already recognised in the Italian legal order, and would have been consistent with the Strasbourg Court's case-law. The ECtHR in *Varvara*[24] has stated that Article 7 of the Convention requires that criminal liability be established by the national judge by means of a conviction. The *Corte Costituzionale* doubted that this had to do only with a formal kind of declaration of guilt. In the Italian legal order, as pointed out, the circumstance that an offence is time-barred does not preclude to ascertain whether the prohibited conduct has been actually committed. In the opinion of the *Corte Costituzionale*, the substance of «criminal» liability should have been preferred to the form. In the referring courts reading of *Varvara*, Article 7 of the Convention would have required that the confiscation be ordered only in context of criminal proceedings and in the presence of a formal conviction. The *Corte Costituzionale* did not see such a principle as being immediately inferable from Article 7. The Constitutional judges argued that the state of play at that moment did not allow for a clear interpretation of *Varvara*, in the sense that Article 7 Convention would have prohibited the confiscation without a «formal» finding of liability.

Fourth reason

Eventually, the questions raised were declared inadmissible since the referring courts had considered themselves obliged to adopt the principle stated in *Varvara*. The Constitutional Court did not see *Varvara* as the expression of an established

22. ECtHR 4 March 2014, App. Nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, *Grande Stevens and Others* v *Italy*, par. 139 onwards.

23. ECtHR 11 January 2007, App. nº 35533/04, *Mamidakis* v *Greece*.

24. *Varvara*, par. 66-71.

case-law of the Strasbourg Court. In this respect, the *Corte Costituzionale* recalled the 348 and 349/07 judgments, according to which the Strasbourg Court has the last word on the interpretation of the Convention and its Protocols. This interpretative function ensures that, by means of a dialogue between the interpreters, legal certainty and uniform application of the Convention are guaranteed throughout the Contracting States. However, the *Corte Costituzionale* firmly stated that this state of play has not turned «national legal operators, including first and foremost the ordinary courts, into passive recipients of an interpretative command issued elsewhere in the form of a court ruling, irrespective of the conditions that gave rise to it»[25].

Indeed, the interpretation and application of national rules remains a matter for the member state courts. This does not amount to saying that these courts can ignore the Strasbourg Court case-law, once the latter has become well-established. In this respect, the Constitutional Court stated that «it is a primary requirement of constitutional law that a stable interpretative equilibrium be reached in relation to fundamental rights which is facilitated, as far as the ECHR is concerned, by the role of ultimate arbiter vested in the Strasbourg Court»[26]. The *Corte Costituzionale*, by recalling its own decisions, reaffirmed the obligation for the ordinary judges to follow the well-established case-law of the Strasbourg Court with regard to a specific norm. On the other hand, the Constitutional Court clarified that the national judge is not deprived for this reason of the margin of appreciation granted to the Member States by the Convention. The national court is called on to apply only such an established case-law, while lacking such an obligation in the presence of a jurisprudence not presenting that feature. According to the Italian Constitutional Court, this consideration is also underpinned by the structure of the Strasbourg Court, which is «structured into sections, allows dissenting opinions and operates a mechanism capable of resolving contrasts within ECHR case law by referral to the Grand Chamber»[27]. Therefore, it is the same Strasbourg Court which postulates the progressive character of its case-law. It does so from a dialogical perspective, which involves all judges applying the Convention, including Constitutional Courts. Such a dialogical perspective would be confirmed by the future adoption of Protocol 16 to the Convention. According to Article 5 of this Protocol, the Strasbourg Court will be able to provide the highest national courts with a *non-binding* opinion.

The *Corte Costituzionale* also mentioned the explanations to Article 8 of Protocol 14, which amended Article 28 of the Convention. According to these explanations, the persuasive nature of a Strasbourg Court's decision may vary until the advent of a «well-established case-law» which «normally means case-law which has been consistently applied by a Chamber», save the exceptional case regarding a principled issue

25. Italian Constitutional Court, decision nº 49/15, par. 7 (Considerato in diritto), available at: *http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S49_2015_en.pdf*.

26. Italian Constitutional Court, decision nº 49/15, par. 7 (*Considerato in diritto*), available at: *http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S49_2015_en.pdf*.

27. Italian Constitutional Court, decision nº 49/15, par. 7 (*Considerato in diritto*), available at: *http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S49_2015_en.pdf*.

«particularly when the Grand Chamber has rendered it». To be sure, the well-established character of a case-law is not always so evident. However, the Constitutional Court pointed out some signifiers, which may orient the national judge in this respect: the creativity of the principle asserted compared to the traditional approach of European case law; the potential for points of distinction or even contrast from other rulings of the Strasbourg Court; the existence of dissenting opinions, especially if buttressed by robust arguments; the fact that the decision made originates from an ordinary division and has not been endorsed by the Grand Chamber; the fact that, in the case before it, the European court has not been able to assess the particular characteristics of the national legal system, and has extended to it criteria for assessment devised with reference to other member states which, in terms of those characteristics, by contrast prove to be little suited to Italy.

Some scholars have criticised judgment nº 49/2015, since it would ask «too much of the ordinary courts, as not all courts have a deep insight into ECtHR case law nor knowledge of its official languages, and it might push the Constitutional Court away from fundamental rights issues, leaving these to ordinary and international courts whose main task is not to guarantee the correct interpretation and application of the Constitution»[28].

Only in the presence of a well-established case-law, a «pilot judgment» or the decision on the specific case, the Italian court would be obliged to recognise the norm interpreted by the Court, in order to overcome the difference between such a norm and the internal law. It would have to do so by using any interpretative techniques or, when impossible, by referring the question to the Constitutional Court. The Constitutional Court will then use the principle stemming from the well-established case-law of the Court as an interposed norm (namely, infra constitutional but supra legislative), except when it exceptionally proves to be incompatible with the Italian Constitution. However, this would be a matter for the Constitutional Court to determine. Should the ordinary judge doubt as to the compatibility between the supranational norm and the Constitution, for this doubt alone that judge should not take into consideration the norm at stake. Since the *Corte di Cassazione* and the «Tribunale» of Teramo had explicitly referred to the *Varvara* case as not expressing a well-established case-law of the Strasbourg Court, they should have considered themselves as not able to give full effect to the principle they derived from that decision. As Pin wrote "this approach is so new that it could prompt both a dramatic decrease in lower courts" challenges of Italian law and a reflection among ECtHR's judges about the extreme rapidity with which they change their case law»[29]. This leads us to the

28. D. Tega, «A National Narrative: The Constitution's Axiological Prevalence on the ECHR-A Comment on the Italian Constitutional Court Judgment nº 49/2015», *Int'l J. Const. L. Blog* (2015), available at *http://www.iconnectblog.com/2015/04/mini-symposium-on-cc-judgment-49-2015/.*

29. A. Pin «A Jurisprudence to Handle with Care: The European Court of Human Rights' Unsettled Case Law, its Authority, and its Future, According to the Italian Constitutional Court», *Int'l J. Const. L. Blog* (2015), available at: *http://www.iconnectblog.com/2015/04/mini-symposium-on-cc-judgment-49-2015/.*

continuity/discontinuity between this decision and the previous case law of the *Corte Costituzionale* which will be explored in the next section of the article.

IV. A DROP (OF DISOBEDIENCE) IN AN OCEAN OF LOYALTY?

Is judgment nº 49/2015 consistent with the previous case law of the Italian Constitutional Court? To begin with, it is not the first time that the Italian Constitutional Court disagrees with the Strasbourg Court. For instance, as cases of disagreement we could recall the *Cordova* saga, concerning parliamentary immunities and the different approach to the issue of the «functional nexus» («nesso funzionale»[30]), which should be interpreted in a narrow sense according to the ECtHR[31]. Another example of disagreement is *Scoppola*[32], concerning the different understanding of the principle of non-retroactivity of criminal laws. For instance, in decision nº 236/2011 the Italian Constitutional Court recalled *Scoppola II* and argued that the understanding of the equivalent principle of *lex mitior* under the ECHR does not correspond (entirely at least) to that of the Italian Constitutional Court. In these cases, the Italian Constitutional Court recalled the ECtHR but also emphasised the differences existing in terms of contexts (by limiting this way the impact of a single case decided by the ECtHR).

In other circumstances the Italian Constitutional Court did the same by distinguishing for instance the type of balance to be struck by two courts. This is the case for instance of the already mentioned decision nº 264/2012. In other words, while the Italian Constitutional Court quoted the Strasbourg Court (complying with the duty to take its case law into account) it also gave arguments to justify the different outcome of the case and the impossibility of transplanting the solution devised in Strasbourg. This distinction between interpretation (taking into account the case law of the ECtHR when

30. The concept of «functional nexus» «refers to the relevance of a MP's opinion in carrying out his functions and in furthering the general political debate, regardless of the place where it has been voiced», C. Fasone, «The European Court of Human Rights finds Italy in violation of Article 6, s. 1 ECHR (Right to a fair trial), contradicting a previous ruling issued by the Italian Constitutional Court addressing parliamentary immunities» Italian Constitutional Court, decision nº 305/2007; ECtHR 24 February 2009, App. No 46967/2007, *C.G.I.L and Cofferati v. Italy* available at: *http://www3.unisi.it/dipec/palomar/italy006_2009.html*.

31. For instance in *Cordova I*, the ECtHR argued that: «The Court takes the view that the lack of any clear connection with a parliamentary activity requires it to adopt a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed. This is particularly so where the restrictions on the right of access stem from the resolution of a political body. To hold otherwise would amount to restricting in a manner incompatible with Art. 6 § 1 of the Convention the right of individuals to have access to a court whenever the allegedly defamatory statements have been made by a parliamentarian». ECtHR, Cordova v. Italy (nº 1) (App. nº 40877/98).

32. ECtHR 17 September 2009, App. nº 10249/03, *Scoppola* v *Italy* (nº 2). On the *Scoppola* saga see: E. Lamarque and F. Viganò, «Sulle ricadute interne della sentenza Scoppola. Ovvero: sul gioco di squadra tra Cassazione e Corte costituzionale nell'adeguamento del nostro ordinamento alle sentenze di Strasburgo (Nota a C. cost. n. 210/2013)», *Diritto penale contemporaneo* (2014) available at: *http://www.ristretti.it/commenti/2014/marzo/pdf11/articolo_scoppola.pdf*.

dealing with fundamental rights) and argumentation (the mere fact of giving an interpretative weight to the ECtHR does not exclude different outcomes, that are explained in light of the particularity of the context, reasoning etc.) is crucial to understand the way in which the Italian Constitutional Court disobeys. Of course one can also read in these decisions a form of hidden criticism to the invasiveness of the Strasbourg Court.

When commenting upon decision nº 264/2012, scholars stressed the language used by the *Corte Costituzionale*, which justified its conclusion on the basis of the alleged consistency with the «essence of the European Court's decision». Such a reference to the «essence» of the ECHR's case law was seen as a way to mask a partial disagreement with the Strasbourg Court, by filtering only those elements of the ECtHR's jurisprudence that can be read consistently with the doctrine of the Italian Court[33].

Another important example of disagreement is given by the different understanding of the principle of legitimate expectation. In *Agrati*[34], concerning the so-called «laws of authentic interpretation» («Leggi di intepretazione autentica»), the Court of Strasburg questioned the case law of the ICC[35] by arguing that:

> «La notion d' "utilité publique" est ample par nature. En particulier, la décision d'adopter des lois emportant privation de propriété implique d'ordinaire l'examen de questions politiques, économiques et sociales. Estimant normal que le législateur dispose d'une grande latitude pour mener une politique économique et sociale, la Cour respecte la manière dont il conçoit les impératifs de l' "utilité publique", sauf si son jugement se révèle manifestement dépourvu de base raisonnable»[36].

Indeed, sometimes the problematic interpretation to be given to polysemous notions like «utilité publique» triggers disagreements. In case nº 257/2011[37], the Italian Constitutional Court tried again to justify the presence of some exceptions to the principle of non-retroactivity of laws on the basis of the existence of a public interest. As the former President of the Italian Constitutional Court, Justice Franco Gallo, said in an important speech given for a meeting in Brussels held on 24 May 2012[38], there is an evident disagreement about the interpretation to be given to the notions of «utilité publique» and «public interest»[39].

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33. A. Ruggeri, «La Consulta rimette abilmente a punto la strategia dei suoi rapporti con la Corte EDU e, indossando la maschera della consonanza, cela il volto di un sostanziale, perdurante dissenso nei riguardi della giurisprudenza convenzionale ("a prima lettura" di Corte cost. n. 264 del 2012)», (2012) available at: *http://www.giurcost.org/decisioni/index.html*.
34. ECtHR 7 June 2011, App. Nos. 43549/08, 6107/09, 5087/09, *Agrati et Autres* c *Italie*.
35. For instance see: Italian Constitutional Court, decision nº 311/2009 available at: *www.cortecostituzionale.it*.
36. ECtHR, *Agrati et Autres* c *Italie*, par. 79.
37. Italian Constitutional Court, decision nº 257/2011, available at: *www.cortecostituzionale.it*.
38. F. Gallo, «Rapporti fra Corte costituzionale e Corte EDU», Brussels, 24 May 2012, available at: *http://www.cortecostituzionale.it/documenti/relazioni_internazionali/RI_BRUXELLES_2012_GALLO.pdf*.
39. Gallo, *supra* nº 38.

In other cases the Italian Constitutional Court marked the territory by excluding the ECHR from the constitutional standard employed to review the constitutionality of a piece of legislation when the domestic provisions offered a mature parameter of constitutionality: this is the case of decision 278/2013 [40]. The case concerned a law providing that the choice to remain anonymous made by a biological mother, whose child had been adopted, retained irrevocable status for 100 years. The Italian Constitutional Court declared this provision unconstitutional without relying on the ECHR, thus showing the maturity of the national legal system in this respect. Similarly, in decision nº 162/2014[41], the Italian Constitutional Court declared the prohibition of heterologous fertilisation unconstitutional. Scholars[42] have pointed out the omitted reference to the ECHR as a part of the constitutional standard, although the Italian Constitutional Court recalled the *S. H.* decision of the ECtHR[43].

In all these cases the Italian Constitutional Court quoted, on the one hand, the case law of the Strasbourg Court but then decided to solve the issue relying exclusively on its constitutional provisions. According to some commentators[44], this way the *Consulta* showed –proudly, we would say– how a certain effect (the removal of an unjust provision) was the autonomous product of our Constitution, without the need for the external help of the ECHR.

This overview does not deny the important novelties introduced by decision nº 49 but allows us to see how this judgment did not come up suddenly. On the contrary, it was anticipated by a series of partial disagreements or masked conflicts between the Italian Constitutional Court and the Strasbourg Court. Such disagreements can be explained as result of the progressive importance acquired by the Convention in the case law of the Italian *Corte Costituzionale*, a success which has sometimes converted a valuable ally into a thorny interlocutor. However, this seems consistent with what is going on at comparative level, as decisions of other Constitutional or Supreme Courts confirm[45].

V. FINAL REMARKS

In this article, after having recalled the most important development after 2007, we summarized the contents of judgment nº 49/2015 of the Italian Constitutional

40. Italian Constitutional Court, decision nº 278/2013, available at: *www.cortecostituzionale.it*.

41. Italian Constitutional Court, decision nº 162/2014, available at: *www.cortecostituzionale.it*.

42. A. Ruggeri, «La Consulta apre alla eterologa ma chiude, dopo averlo preannunziato, al "dialogo" con la Corte EDU (a prima lettura di Corte cost. n. 162 del 2014)», *Forum costituzionale* (2014), available at *www.forumcostituzionale.it/*.

43. ECtHR 3 November 2011, App. nº 57813/00, *S. H. and Others vv. Austria*, Grand Chamber.

44. Lamarque and Viganò *supra* nº 32.

45. UK Supreme Court *R v Horncastle and Others* [2009] UKSC 14, par. 11; UK Supreme Court, *Manchester City Council v Pinnock* [2010] UKSC 45, par. 48; 2 BvR (German Constitutional Court) 1481/04 Austrian Constitutional Court, Miltner, *VfSlg* 11500/1987, available at *http://www.ris.bka.gv.at/vfgh/*.

Court. We tried to point out that judgment nº 49 did not come completely out of the blue, but shows some continuity with the post-2007 case law of the *Corte Costituzionale*.

The openness to the ECHR and its judges, somehow acknowledged by the Italian Constitutional Court in 2007, has (sometimes) turned against itself, and the *Corte Costituzionale* has progressively shown a growing embarrassment about how to «handle» the decisions of the Strasbourg Court.

In decision nº 49 the distinction between «established» and «non-established case law» has been seen by the first commentators as a return to the past and as a partial contradiction with the constitutional openness characterizing the twin judgments of 2007.

As recalled at the beginning of this contribution, the ECtHR recalled judgment nº 49 in par. 100 of the *Parrillo* decision (a case concerning *in vitro* fertilization, in which the Strasbourg Court found no violation of Article 8 of the ECHR). Moreover, in their jointly partly concurring opinion judges Casadevall, Raimondi, Berro, Nicolaou and Dedovalso also quoted the decision of the *Consulta* by adding that:

> «We observe that the reasoning of the judgment –from which we must, partially, depart for the reasons outlined above– refers to judgment nº 49/2015 of the Italian Constitutional Court… and that this reference gives the judgment an eclectic flavour. We see an opening here with regard to the traditional case-law… The weight given to that decision in the reasoning of the present judgment paves the way, in our opinion, towards a departure from the Court's traditional case-law –within the limits permitted by the precedent of the Italian Constitutional Court of course– which may lead it to consider that even where legislation is directly at the root of the alleged violation a potential applicant must in principle first apply to the domestic courts in so far as the very substance of the precedent established in Constitutional Court judgments nos. 348 and 349 of 2007, and attenuated by judgment nº 49/2015 delivered by that court, is not called into question»[46].

This reference confirms the relevance (even beyond the national boundaries) of decision nº 49/2015 in the relationship between these two Courts. More recently, the Italian Constitutional Court recalled judgment nº 49 in judgment nº 184/2015[47], order nº 187/2015[48] and judgment nº 36/2016[49]. Especially in the last one, judgment nº 49 was mentioned to stress the priority acknowledged to the interpretation consistent with the Constitution over the other forms of conform interpretation. However, as stressed in this work, the possible disagreement between Constitutional

46. ECtHR, *Parrillo*, partly concurring opinion judges Casadevall, Raimondi, Berro, Nicolaou and Dedovalso.

47. Italian Constitutional Court, decision nº 184/15, available at: *http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S49_2015_en.pdf*.

48. Italian Constitutional Court, decision nº 187/15, available at: *http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S49_2015_en.pdf*.

49. Italian Constitutional Court, decision nº 36/2016, available at: *http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S49_2015_en.pdf*.

Courts and the Strasbourg Court can be seen as the direct offspring of the constitutional openness shown in 2007. Once having opened the door to the influence of the interpretative authority of another court, Constitutional or Supreme Courts do not give up their role of gatekeepers: openness does not imply automatic acceptance of what comes from the «outside».

In this respect, judgment nº 49/2015 is just the apex of a crescendo, the tip of the iceberg after some cases where the Italian Constitutional Court had already shown to be ready to depart from the case law of the Strasbourg Court. *Scoppola*, *Cordova*[50], *Agrati*[51], among others, are just some examples of divergences between the Italian Constitutional Court and the ECtHR.

To understand the reasons and the modalities of such divergences, we recalled a speech given by the former President of the Italian Constitutional Court, Franco Gallo[52]. The premise of that speech was that the ECHR gives an added value to the protection of fundamental rights («a plus of protection»[53]) in the Italian legal system; however, as he pointed out: «the work of transposition of the case law of the ECtHR into the national legal order has not been easy»[54].

These words are emblematic of a certain tension that has emerged over recent years and the intent, by the *Consulta*, to express its voice. As many other Constitutional or Supreme courts do[55], the Italian Constitutional Court has sometimes found difficulty in «transplanting» («judicial transplant» is the formula employed by Justice Gallo in his speech) the solutions devised by the ECHR into the domestic systems.

50. ECtHR, *Cordova* v *Italy* (nº 1); ECtHR 30 January 2003, App. nº 45649/99, *Cordova* v *Italy* (nº 2).
51. ECtHR, *Agrati et autres* c *Italie*.
52. Gallo, *supra* nº 38.
53. To quote the terminology used by the Italian Constitutional Court, decision nº 317/2009, available at: *www.cortecostituzionale.it*.
54. Gallo *supra* nº 38.
55. See *supra* nº 45.